U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY L. KINDSFATHER and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 97-2185; Submitted on the Record;
Issued December 13, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for bilateral aggravation of preexisting noise-induced hearing loss; (2) whether the Office properly denied appellant's request for a hearing as untimely; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On September 17, 1995 appellant, then a 56-year-old welder, filed a claim for "loss of hearing and continual ringing in both ears" which he attributed to factors of his federal employment. Appellant did not stop work.

The record indicates that appellant began working at the employing establishment in September 1989. A physician noted on a 1989 audiogram performed on appellant prior to his employment that he required bilateral hearing aids.

The employing establishment submitted a summary of appellant's noise exposure during the course of his employment from September 1989 to the present time and noted that he always wore hearing protection.

In a report dated December 8, 1995, an Office medical adviser stated, "[Appellant] had a severely sloping bilateral sensorineural hearing loss on January 3, 1989, six months before he began working with [the employing establishment] on September 7, 1989." The Office medical adviser further noted that a January 30, 1995 audiogram revealed "a significant deterioration in hearing between [19]89 and [19]95. More likely than not this aggravation of an existing hearing loss was due to hazardous noise [he] was exposed to at the [employing establishment]." He recommended that the Office refer appellant for a second opinion evaluation.

In a note signed December 13, 1995, the Office informed appellant that it had accepted his claim for bilateral hearing loss. On its Form CA-800, FECA Nonfatal Summary, the Office

indicated that it had accepted appellant's claim for bilateral aggravation of preexisting noise-induced hearing loss.

By letter dated January 24, 1996, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. William T. Ritchie, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated February 7, 1996, Dr. Ritchie diagnosed bilateral sensorinueral hearing loss and opined that part of appellant's hearing loss was secondary to occupational noise exposure and part to "an idiopathic, progressive disease." He stated, "[Appellant's] noise[-]induced hearing loss probably preexisted his employment with the [employing establishment]. The recent progression in his hearing loss has been due to disease process."

In a letter dated February 29, 1996, the Office requested that Dr. Ritchie provide an opinion regarding whether appellant's hearing loss was due in any part to his noise exposure at the employing establishment.

In a supplemental report dated March 8, 1996, Dr. Ritchie related:

> "It is possible that some of [appellant's] hearing loss could be due to noise exposure at the shipyard, since the noise survey data do document that he could have been exposed to levels that would be injurious. There were no dose level time weighted average measurements taken, however. From the available information, on a medical probability basis, the shift in his hearing level, during his employment at the [employing establishment], was not caused by noise exposure. The hearing loss has been accelerating and it is asymmetrical. The loss involves frequencies that are not usually affected by noise and the loss is greater, especially in the left ear, than could be accounted for by noise.
>
> "[Appellant] has a long history of working as a welder and he probably does have a noise[-]induced hearing loss that occurred early in his working career. My opinion, based on medical probability, is that his hearing loss is ALL NOT DUE to his noise exposure at the [employing establishment]." (Emphasis in the original.)

By decision dated June 6, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish a causal relationship between his hearing loss and his federal employment.[1]

[1] In its decision dated June 6, 1996, the Office denied appellant's claim on the grounds that the medical evidence did not establish a causal relationship between his hearing loss and factors of his federal employment. However, the Office had previously informed appellant that it had accepted his claim for bilateral hearing loss and indicated on its Form CA-800 that it had accepted a bilateral aggravation of preexisting noise-induced hearing loss. In effect, the Office's June 6, 1996 decision rescinded its earlier acceptance of the claim for bilateral hearing loss; *see Ausbon Johnson*, 50 ECAB ___ (Docket No. 97-1567, issued March 19, 1998).

In a letter dated July 1, 1996 and postmarked July 8, 1996, appellant requested a hearing before an Office hearing representative. By decision dated August 2, 1996, the Office denied appellant's request for a hearing as untimely.

By letter dated October 3, 1996, appellant, through his representative, requested reconsideration and submitted additional evidence.

By decision dated October 11, 1996, the Office denied merit review of the prior decision on the grounds that the evidence submitted was not relevant.

The Board finds that the case is not in posture for a decision as the Office improperly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states, "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[3]

Regulations implementing the Act provide that a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[4] When the last day to perform an act falls on a nonbusiness day the time is extended to the next regular business day.[5] The Board has applied this rule to determine questions of timeliness arising under the Act.[6]

In the present case, the Office issued a decision effectively rescinding acceptance of appellant's claim for bilateral hearing loss on June 6, 1996. The 30-day period for determining the timeliness of appellant's hearing request commenced on the first day following the issuance of the Office's June 6, 1996 decision. The 30th day following the Office's decision, July 6, 1996, fell on a Saturday. Thus, appellant had until Monday, July 8, 1996, the first regular business day following July 6, 1996, to request a hearing on his claim.[7] As appellant submitted a request for a hearing which was postmarked July 8, 1996, his request is timely filed and he is entitled to a

[2] 5 U.S.C. § 8124(b)(1).

[3] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[4] 20 C.F.R. § 10.131(a).

[5] *Robert E. Kennedy*, 20 ECAB 349 (1969) (quoting *Wirtz v. Local Union 169*, 249 F. Supp. 741 (D.C. Nev. 1965)).

[6] *John B. Montoya*, 43 ECAB 1148 (1992) (in computing a time period the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday).

[7] *See Gary J. Martinez*, 41 ECAB 427 (1990).

hearing as a matter of right. Consequently, the case must be remanded for the Office to provide appellant a hearing under section 8124. Upon return of the case record, the Office should schedule a hearing before an Office hearing representative.[8] After such further development as may be deemed necessary, the Office should issue a *de novo* decision on appellant's claim.

The decisions of the Office of Workers' Compensation Programs dated October 11 and June 6, 1996 are set aside and the decision dated August 2, 1996 is reversed and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
December 13, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[8] As appellant filed a timely request for a hearing, the case must be remanded for scheduling of the hearing. Thus, any issue relevant to the merits of appellant's claim in the Office's June 6, 1996 decision cannot be addressed as the merits are subject to further adjudication, and the October 11, 1996 decision is null and void since appellant filed a timely request for a hearing.